Supreme Court, U.S.
FILED

97-113 JUL 2 1997

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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PERRIN W. HURDLE

Petitioner,

versus

SEARS, ROEBUCK AND COMPANY

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

IS FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW, VIOLATED BY THE FIFTH CIRCUIT COURT OF APPEALS APPLICATION OF 29 U.S.C.A. SECTION 626(f) IN A MANNER WHICH RESULTS IN CLAIMS OF COVERED EMPLOYEES BEING DENIED, WHILE OTHER CIRCUITS EXTEND PROTECTION UNDER THE SAME STATUTE TO PERSONS SIMILIARLY SITUATED, WITH THE SAME OR SIMILAR FACTS AS PETITIONER?

PARTIES

The Petitioner is:

Perrin W. Hurdle

The Respondent is:

Sears, Roebuck & Company

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REFERENCE TO OFFICIAL REPORTS OF OPINIONS BELOW

The judgment sought to be reviewed was entered in the Fifth Circuit Court of Appeals and entitled:

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 96-60321

PERRIN W. HURDLE

VERSUS

SEARS, ROEBUCK AND COMPANY

The judgment reviewed by the United States District Court, for the Southern District of Mississippi, Southern Division, and was entered on the 12th day of April, 1996, and entitled:

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

NO. 1:95cv247-Br-R

PERRIN W. HURDLE, Plaintiff

VERSUS

SEARS, ROEBUCK AND COMPANY, Defendant

The opinion of the Fifth Circuit Court of Appeals is in the Appendix at (A-1).

JURISDICTION

The judgment for which review is sought was entered April 15, 1997. The judgment for which review is sought is a final judgment of the Appeals Court where review could be sought from a judgment entered by the Federal District Court, and where the judgment turns upon substantial federal questions. Jurisdiction of the United States Supreme Court is pursuant to 28 United States Code, Section 1257.

The federal questions involved arise out of the interpretation and application of 29 U.S.C. 626(f), the Older Workers Protection Act (OWBPA) and a denial of due process and equal protection under the law in the application of 29 U.S.C. 626(f) by the Fifth Circuit Court of Appeals in violation of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

FOURTEENTH AMENDMENT

Section 1

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

29 United States Code, Section 626(f):

> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights to claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the document;

(F) ... (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate,

as to - (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and, (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

STATEMENT OF THE CASE

In July, 1993, the Plaintiff, Perrin W. Hurdle was employed by the Defendant Sears, Roebuck & Company (Sears) in a management position from which he was laid off. Prior to this he had worked continuously for Sears for a period of 26 years in its Biloxi, Mississippi store. On July 20, 1993, Mr. Hurdle was called into the store on his day off, by the store manager, Rick Wickboldt, and informed that he was no longer needed at Sears and that he was being laid off immediately. (A 8) This meeting lasted approximately 25 minutes at the most (A 9), and was probably shorter in duration. During the meeting Mr. Hurdle was asked to execute a General Waiver which included a waiver of an age discrimination claim in order to receive a severance package. Rick Wickboldt stated that he understood executing the waiver was necessary to get the severance package and also that it was necessary to get extra severance pay. This was the first waiver that Wickboldt had actually done with an employee.

Mr. Hurdle was taken by surprise by the content of the

meeting with Wickboldt and the news of the lay-off. On the day he was presented with the Waiver, Hurdle did not really comprehend what the Waiver said and/or did. (A 8,9) Additionally, he stated that Rick Wickboldt informed him that the execution of the waiver was only a formality. (A 8) Following this meeting, and within the seven (7) days provided for in the waiver, Mr. Hurdle took steps to attempt to revoke the waiver. (A 9)

Sears, Roebuck filed for summary judgment on the basis that the Hurdle had ratified the Waiver which Wickboldt gave him to sign.

The U.S. District Court felt that a issues of fact existed as to the execution of the waiver presented to Hurdle by Sears. However, the Court found that a ratification of the waiver would negate any waiver deficiencies, as the Fifth Circuit had previously so held. (A 13)

ARGUMENT

IS FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW, VIOLATED BY THE FIFTH CIRCUIT COURT OF APPEALS APPLICATION OF 29 U.S.C.A. SECTION 626(f) IN A MANNER WHICH RESULTS IN CLAIMS OF COVERED EMPLOYEES BEING DENIED, WHILE OTHER CIRCUITS EXTEND PROTECTION UNDER THE SAME STATUTE TO PERSONS SIMILARLY SITUATED, WITH THE SAME OR SIMILAR FACTS AS PETITIONER?

In 1990, Congress passed the Older Workers Protection Act (OWBPA), Public Law 101-433, as an amendment to the ADEA which added subsection (f) to 29 U.S.C.A. Sec. 626.

Subsection (f) Waiver lists specific requirements that must be met in order for a waiver to be considered "knowing and voluntary":

> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under this chapter;
>
> (C) the individual does not waive rights to claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the document;

(F) ... (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to - (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and, (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

The different federal courts of appeals have applied the language of 29 U.S.C.A. Sec. 626(f) in two fundamentally different ways. The Fifth Circuit and the Fourth Circuit have -

held that an otherwise invalid release and waiver can be ratified. While the Seventh Circuit, Eleventh Circuit, and the court of appeals in Massachusetts (First Circuit) have found that if the release and waiver is invalid it cannot be ratified by the employee.

DUE PROCESS AND EQUAL PROTECTION

Prior to the passage of the OWBPA, Congress passed amendments to the ADEA in an effort to resolve conflicts that had arisen among the federal courts of appeals in their respective interpretation of the same provision of the Act. S. Rep. No. 101-263, 101st Cong., 2d Sess. 5, *reprinted in* 1990 U.S. Code Cong. & AD. News 1509 at 1513

In reviewing the provisions of the OWBPA, the language of Section 626(f) is clear.

> When the plain text of a statute is clear then 'courts must presume that a legislature says in a statute what it means and means in a statute what it says. When the words of a statute are unambiguous, then, this first cannon is also the last: 'judicial inquiry is complete.'

Oberg v. Allied Van Lines, Inc., 11 F.3d 679 at 683 (7th Cir. 1993) citing to Connecticut Nat. Bank v. Germain, 503 U.S. 249,

112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992), *citations omitted*

The case at hand highlights the problem which occurs when the OWBPA, or any federal statute, is applied to different persons in the same factual scenario when the outcome is solely dependent upon one's geographical location. It is a denial of one's fundamental rights of Due Process and Equal Protection under the law, granted to each citizen in the Fourteenth Amendment to the United States Constitution, to differ the application of the same provision of a statute to different persons who share the same fact scenario.

For example, in Collins v. Outboard Marine Corp., 808 F.Supp 590 (N.D.Ill 1992) the court of appeals found that the release and waiver agreement executed by the parties did not meet the OWBPA waiver requirements. The court further found "that a release cannot be deemed knowing and voluntary unless all of the technical requirements of the OWBPA have first been satisfied. Therefore, the release is invalid as to plaintiff's ADEA claim." 808 F.Supp at 594 In addition, if there is no valid waiver, than there can be no ratification.

In Oberg v. Allied Van Lines, 11 F.3d 679 (7th Cir. 1993), the Seventh Circuit found that the waivers executed by the plaintiffs did not include either Section 626(f) subsections (1)(F) or (1)(H). Therefore, the plaintiffs could not have knowingly and voluntarily waived any claims or rights under the ADEA. The court held that the waivers were invalid, and therefore, could not be ratified.

In the above Circuits, if the release and waiver does not comply with the provisions of the OWBPA, and/or, is not knowing and voluntary, then it is invalid, and the employee may pursue his claim.

However, the opposite is result is seen in Wamsley v. Champlin Refining & Chemicals, Inc., 11 F.3d 534 (5th Cir. 1993) which held that Sec. 626(f) merely makes the waiver voidable at the employee's election. In Wamsley, supra. the appellants denied that they had received the 45 days required under the statute in which to consider the waiver; the appellees stated otherwise. The Fifth Circuit clearly stated that this was a fact issue which could not be resolved via summary judgment.

Notwithstanding this the court went on to address the issue of ratification. The end result was that the appellants in Wamsley were found to have ratified the release and were denied the pursuit of their claim.

The Fifth Circuit position has either interjected an additional provision into Section 626(f) by stating that an invalid waiver can be ratified, or, at a minimum somehow extracted this provision from one of the subparts of Section 626(f).

The different Circuit cases represent the differing and inconsistent application of the same OWBPA provision to different persons in the same factual setting. In the case at hand, if the same events had happened to Hurdle in the State of Illinois, rather than, the State of Mississippi, the release would have been held to be invalid by the district court and he would be allowed to pursue his claim. Hurdle is therefore being denied his fundamental rights to due process and equal protection under the law merely because the Release was executed in Mississippi rather than Illinois.

LEGISLATIVE HISTORY

The Majority report of the Congressional Committee for the Older Workers Protection Act, Public Law 101-433, contains valuable insight as to the intent of the framers of the Act. For instance, the "Committee intend[ed] that the requirements of title II be strictly interpreted to protect those individuals covered by the Act." S. Rep. No. 101-263, 101st Cong., 2d Sess. 5, *reprinted in* 1990 U.S. Code Cong. & AD. News 1509 at 1537 In addition, "these requirements [were included] with the intent of according basic due process protections to employees who are asked to execute waivers." Id. at 1537 Clearly, Congress intended that all persons affected would be treated the same, and likewise receive the same benefits and protection afforded by the Act.

The current application of 29 U.S.C.A. 626(f) by the different courts of appeals results in persons in Circuit districts such as the Seventh Circuit being provided with greater protection than similarly situated persons in Circuit districts such as the Fifth Circuit. Therefore, all persons covered by the OWBPA are not being protected equally - contrary to

Congressional intent.

In the instant case, the amount of time (or lack thereof) which Hurdle had prior to signing the General Release and Waiver Agreement is important. It is un-disputed that Hurdle had approximately 30 minutes. The Release itself, in accordance with the provisions of the OWBPA, states that Hurdle had at least 45 days in which to review the agreement.

In discussing the time aspect of individual separation agreements, the Committee stated:

> Moreover, a waiver is not valid unless the individual is given a reasonable period of time in which to review and consider the settlement agreement. An employee who is terminated needs time to recover from the shock of losing a job, especially when that job was held for a long period. The employee needs time to learn about the condition of termination, including any benefits being offered by the employer. Time also is necessary to locate and consult with an attorney if the employee wants to determine what legal rights may exist. In the case of an individual separation agreement, the individual must be given at least 21 days within which to consider the agreement."

Id. at 1538

The Committee further stated that for group termination

programs the employee needs even more time, hence the 45 day requirement for these waivers. Id. at 1539

More importantly, the Committee addressed the issue of a waiver as an affirmative defense. In Subsection D, the Committee stated that, "[a]ll of the criteria discussed above must be met in order for a waiver to be valid." Id. at 1540 Furthermore, the Committee Report states:

> Courts may not consider whether a "knowing and voluntary" waiver has been executed until the party asserting the waiver as a defense first proves that each of the requirements set forth in the bill has been satisfied. These requirements include: (1) the waiver is part of a written agreement; (2) the agreement makes specific reference to rights and claims under the ADEA; (3) the waiver does not apply to rights or claims that may arise after the date of the agreement itself; (4) the waiver is exchanged for valuable consideration in addition to what the individual already is entitled to receive; (5) the individual is given a reasonable time period in which to review and consider the agreement; and, (6) the individual is advised in writing to consult with an attorney.

Id. at 1511

Nowhere in the Committee Report does the Committee state or even imply that an invalid waiver can be ratified. There

is no discussion of ratification in the Majority report.

Wamsley:

The existing opinions in the Fifth Circuit (and to some extent in the Fourth Circuit) are based upon the Court's prior opinion in Wamsley v. Champlin Refining Air & Chemicals, Inc., 11 F.3d 534 (5th Cir. 1993). The Wamsley Court questioned whether the waiver requirements of the OWBPA made the Court's holding in Grillet v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir.1991) unsound. The Court stated its belief that nothing in the history of the OWBPA evidenced a congressional intent to disturb the common law principles in which the Grillet holding was founded. Hence the continued application of the Grillet and Wamsley cases.

The principle in question was the common law principle of ratification. The answer to the Fifth Circuit's Wamsley question is found in the Minority Views of the Committee Report at ***B. Current Law***, wherein it is stated that:

> The prohibitions regarding the use of waivers in Title II represent a radical departure from current law and not a clarification, as

> supporters of this bill have suggested. Further, the rationale for this legislation appears to ignore safeguards under current law applicable to the execution of waivers.
>
> So long as waivers meet certain criteria, courts have uniformly upheld their use for any number of causes of action under federal and state law including Title VII. Why, one might then legitimately ask, should waivers under the ADEA justify being treated differently?

S. Rep. No. 101-263, 101st Cong., 2d Sess. 5, *reprinted in* 1990 U.S. Code Cong. & AD. News 1509 at 1565

In accordance with the language in the Minority View, it is quite apparent that the Congressional intent with the addition of section 626(f) was, and is, to treat waivers under the OWBPA differently than they had previously been treated by the judicial system.

To an extent, the Fifth Circuit recognizes that the provisions of the OWBPA place "specific requirements on waivers of age discrimination claims in order for them to be considered knowing and voluntary, this statute is a change from the common law ...." Williams v. Phillips Petroleum Co., 23 F.3d 930 at 936 (5th Cir. 1994)

The question then becomes, why does the Fifth Circuit acknowledge that the OWBPA altered the common law existing prior to the passage of the OWBPA, but still continue to interpret the OWBPA to conform with prior existing common law?

One other commentary to Wamsley, supra. must be made. At page 539 of the Court's opinion the following statement was made:

> We also find that the provisions of section 626(f)(1) support our conclusion that defective waiver agreements are voidable and not void. Section 626(f)(1)(G) expressly provides that for seven days after execution of a waiver agreement an employee may revoke the agreement and that the agreement does not become enforceable until the expiration of the seven day revocation period. If non-compliance with the other subparts of section 626(f)(1) rendered the agreement void, there would be no need for subpart (G).

Wamsley, 11 F.3d at 539

This statement by the Court completely overlooks the point that the OWBPA is providing a seven (7) day out for those employees who have executed a valid release and waiver, and then decide for whatever reason that they wish to re-think their

decision and back out. It is an escape hatch for an employee from the valid release and waiver that he/she knowingly and voluntarily entered.

CONCLUSION

Mr. Hurdle has been deprived of a right which has been extended to other persons similarly situated as he by other District Courts and Courts of Appeals in the United States. Clearly, under the existing case opinions in other Circuits Mr. Hurdle would have been received the protection of 29 U.S.C. 626(f) under the same facts that exist in this case. However, because the Fifth Circuit Court of Appeals has chosen to interpret 29 U.S.C. 626(f) differently than certain other Circuits, Mr. Hurdle is denied the protection given to others.

Accordingly, it is a matter of great national concern which deserves a full review of this Honorable Court. The Court should grant this petition and after due consideration set aside the erroneous judgment of the Fifth Circuit Court of Appeals with directions on how the Circuits should have the same application and interpretation of 29 U.S.C. 626(f), and extend

the same rights of due process and equal protection under the law to all citizens similarly situated as Perrin W. Hurdle.

RESPECTFULLY SUBMITTED, this the _____ day of June, 1997.

Supreme Court, U.S.
FILED

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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PERRIN W. HURDLE

Petitioner,

versus

SEARS, ROEBUCK AND COMPANY

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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Opinion of the Fifth Circuit

Perrin W. Hurdle

vs.

Sears, Roebuck and Company

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 96-60321
Summary Calendar

PERRIN W. HURDLE

v.

SEARS, ROEBUCK AND COMPANY

PER CURIAM.

JONES, DeMOSS and PARKER, for the Court:

Appellant Perrin Hurdle appeals the summary judgment dismissal of his age-discrimination lawsuit. He argues that genuine issues of material fact exist which preclude summary judgment; that the district court violated his constitutional rights by holding that an otherwise invalid waiver could be ratified; and that, even if it had been ratified, the waiver he executed did not bar his age-discrimination claim. We have reviewed the record and the district court's opinion and conclude that summary judgment was properly awarded in favor of Appellee Sears, Roebuck and Company. Accordingly, we affirm for essentially the reasons given by the district court. See Blakeney v. Lomas Info. Sys., Inc., 65 F.3d 482, 484-85 (5th Cir. 1995), cert. denied, 116 S.Ct. 1042 (1996); Wamsley v. Champlin Refining & Chem., Inc., 11 F.3d 534, 539-40 (5th Cir. 1993), cert. denied, 115 S.Ct. 1403 (1995).

Hurdle's constitutional arguments, raised for the first time on appeal, do not show error, plain or otherwise.

AFFIRMED.

A 4

DOCUMENT

Order of Dismissal by the U.S. District Court

Perrin W. Hurdle

vs.

Sears, Roebuck and Company

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

PERRIN W. HURDLE
V.
SEARS, ROEBUCK AND COMPANY

ORDER OF DISMISSAL

This matter having come before the Court on the motion of the Defendant, Sears, Roebuck and Company, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having granted said motion in a Memorandum Opinion of even date herewith; and there being no other claims asserted by the Plaintiff.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that the above-styled cause and action should be, and the same is hereby, dismissed with prejudice.

SO ORDERED AND ADJUDGED, this the 11th day of April, 1996.

/s/ David Bramlette
UNITED STATES DISTRICT JUDGE

DOCUMENT

Memorandum Opinion of U.S. District Court

Perrin W. Hurdle

vs.

Sears, Roebuck and Company

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

PERRIN W. HURDLE
V.
SEARS, ROEBUCK AND COMPANY

MEMORANDUM OPINION

Before the Court is the motion of the Defendant, Sears, Roebuck and Company ("Sears"), for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In support of said motion, Sears offers the executed release of the plaintiff, Perrin Hurdle ("Hurdle"), discharging Sears from any liability Sears may have arising out of Hurdle's employment termination. This motion necessarily involves certain requirements codified at Title 28 Section 626(f), commonly referred to as the Older Worker Benefit Protection Act ("OWPA"). Moreover, this Court has been called upon to interpret said release in light of general contract law as it applies to voidability and recision. Having reviewed the memoranda of counsel, the attached documentation, the applicable statutory and case law, and being otherwise fully advised in the premises,

this Court is of the opinion that said motion is well-taken and should be granted for the reasons set forth below.

FINDINGS OF FACT

The facts, case in a light most favorable to the plaintiff, establish that Hurdle was terminated from his position as Assistant Manager of the Facilities following company reorganization. On the afternoon of July 20, 1993, store manager Rick Wickboldt contacted Hurdle and asked Hurdle to come to the store. Upon retiring to Wickboldt's office, Wickboldt informed Hurdle that he was being laid off. Hurdle avers that Wickboldt told him that in order to obtain severance pay he must execute a waiver. Hurdle believed this step to be a mere formality. Moreover, Hurdle contends that Wickboldt expressly assured him that said release would not affect any rights Hurdle may have against Sears for age discrimination.

Hurdle testified in his deposition that he did not read the document but simply "scanned it." Hurdle admits that he may have read the words but qualifies said admission by arguing that he did not understand them at the time. Later in his deposition

testimony, Hurdle avers that he never was advised in writing or given the opportunity to seek legal counsel. Hurdle, does, however, testify that he was not coerced to sign the release. The entire meeting lasted no more than thirty minutes.

The release in question provided Hurdle forty-five days in which to consider signing the release. In addition, a seven day revocation period was afforded. Hurdle admits that he was aware of, and understood, these provisions when he signed the release. In fact, Hurdle argues that he attempted to rescind the release with the seven day period. While Hurdle acknowledges the presence of the forty-five day provision, he argues that he was afforded no more than thirty minutes despite that provision.

Explaining his attempt at recision, Hurdle testified that he contacted the Equal Employment Opportunity Commission and relayed his story. Hurdle avers that the EEOC informed him that he did not have a viable cause of action. Hurdle has not, however, demonstrated to this Court that he contacted Sears in an effort to make Sears aware of his intent at any time during this seven day period. Following his encounter with the EEOC,

Hurdle took no further action.

As provided by the release, Hurdle received his entitlement under the severance package. Hurdle has not, to date, returned said money to Sears. Hurdle has, however, set the funds aside in a separate account. Hurdle explained by answering the following questions:

Q. Okay. Have you at any time since your discharge offered to return any of the money that Sears paid you following this -- following July of '93?

A. The money was all put in an account. It's still sitting there until this matter is resolved.

Q. Have you ever offered it back to Sears?

A. Not until I see get a forum from someone that will go ahead and let's resolve this.

Q. Is your answer "no" to that question?

A. That's correct.

A brief summary of Hurdle's contentions will aid in tying these factual allegations together. In short, Hurdle contends that he signed said release under duress. As described by Hurdle, "I

had a financial gun stuck at my head at a moment's notice." Hurdle further alleges misrepresentation inasmuch as Hurdle avers that Wickboldt assured him that said waiver would not preclude a suit based on age discrimination.

STANDARD OF REVIEW

Summary judgment is designed "to secure the just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (citation and internal quotation omitted); *see Barry v. Armstrong Rubber Co.,* 780 F.Supp. 1097, 1099 (S.D.Miss.1991), *aff'd,* 989 F.2d 822 (5th Cir.1993), *cert. denied,* 114 S.Ct. 1067 (1994). A grant of summary judgment is appropriate when, viewed in the light most favorable to the nonmoving party, "[t]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

The moving party bears the initial burden of establishing

the absence of genuine issues of material fact. *Little v. Liquid Air Cor.,* 37 F.3d 1069 (5th Cir. 1994)(en banc). Once the burden of the moving party is discharged, the burden shifts to the nonmoving party to go beyond the pleadings and show that summary judgement is inappropriate. *Little,* 37 F.3d at 1071. The nonmoving party is obligated to oppose the motion either by referring to evidentiary material already in the record or by submitted additional evidentiary documents which set out specific facts indicating the existence of a genuine issue for trial. Fed.R.Civ.P. 56(e); *Fields v. South Houston,* 922 F.2d 1183, 1187 (5th Cir.1991). A mere scintilla will not defeat a motion for summary judgment; there must be sufficient evidence upon which "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986) (finding summary judgment appropriate even if "there is some metaphysical doubt as to the material fact"). If the nonmovant

satisfies its burden, summary judgment will not be granted. *Fields*, 922 F.2d at 1187.

CONCLUSIONS OF LAW

Much debate looms over whether Sears complied with the requirement set forth in the OWPA. The above colloquy demonstrates several issues of fact concerning Sears' compliance with section 626(f) and the actions of Wickboldt. Even though for purposes of this motion we must consider the release voidable,[1] the Fifth Circuit has held that voidable releases are nonetheless enforceable if ratified by the employee. *Wittor v. Shell Oil Co.*, 37 F.3d 1151, 1154 (5th Cir.1994).

A waiver is ratified when the employee fails to tender back to the employer severance benefits received in exchange for execution of the waiver. *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir.1991). To rescind the waiver and avoid ratification, the plaintiff must meet two burdens: (1) the plaintiff

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[1]The Fifth Circuit has conclusively determined that defective waiver agreements are voidable under the OWPA and not void. *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534, 539 (5th Cir.1993).

has to restore the status quo ante and (2) the recision has to occur shortly after the discovery of the alleged deficiency. *Grillet,* 927 F.2d at 220. "A person who signs a release, then sues his or her employer for matters covered under the release, is obligated to return the consideration upon learning of the invalidity of the release." *Williams v. Phillips Petroleum Co.,* 23 F.3d 930, 937 (5th Cir.), *cert. denied* --- U.S. ---, 115 S.Ct. 582, 130 L.Ed.2d 497 (1994). "When [an employee decides] to retain and not tender back to [his employer], [he] manifests [his] intention to be bound by the waivers and thus, [make] a new promise to abide by their terms." *Wamsley,* 11 F.3d at 540.[2]

---

[2]This concept was further explained by the Fifth Circuit:

A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made. REST.CONT. Sec. 2. That a promise has been made can be determined from conduct as well as words. REST.CONT. Sec. 19. Here the conduct giving rise to Appellants' promise to perform under their waivers was their retention of the consideration for their waivers. That appellants may have subjectively intended something different is of no moment.

> In the final analysis, the objective theory of contracts, as distinguished from the subjective theory, is based on analogy to estoppel. This is apparent whenever a person is held bound by a contract because of this manifestations when his

Hurdle contends that he was unaware of the waiver's deficiency and under the impression that he had not waived his rights under the ADEA. Moreover, Hurdle argues that the record is devoid of facts to demonstrate when and how Hurdle finally became aware of the waiver's deficiency triggering prong two of our analysis. Likewise, Hurdle argues that he is willing to return his benefits once a "forum" entertains his suit.

We note that this suit was filed in May of 1994 approximately eleven months past. for the plaintiff to successfully revoke the release, Hurdle must have sought to restore the status quo ante shortly after discovering the waiver's deficiency. At the very least, Hurdle would have had to return his severance benefits after consulting an attorney about the possibility of bringing a claim for age discrimination. *Blakeney v. Lomas Information Sys., Inc.,* 879 F.Supp. 645, 649 n.7 (N.D.Tex.), *aff'd,* 65 F.3d 482 (5th Cir.1995), *cert. denied,* 116

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manifestations are contrary to his actual state of mind.

1 SAMUEL WILLISTON, WILLISTON ON CONTRACTS, Sec. 98, p.362 (1957)(footnote omitted).

Wamsley, 11 F.3d at 540 n.10.

S.Ct. 1042 (1996). Even if Hurdle tendered the benefits today, a tender made eleven months after the filing of the suit is untimely. *Blakeney,* 65 F.3d at 485 n.2. More importantly, Hurdle has made no such tender and chose to retain the benefit of his bargain.

Hurdle's second argument that not tendering the money received is not dispositive inasmuch as he set the money aside and is willing to return such as soon as a "forum" entertains his suit is likewise not persuasive. "Tendering a severance payment back to the employer only upon the court's endorsement of the plaintiffs' ADEA claims is not a timely revocation of the waiver." *Blakeney,* 879 F.Supp. at 649; *Williams,* 23 F.3d at 930 ("[o]ffering to tender back the consideration after obtaining relief in the lawsuit would be insufficient to avoid a finding of ratification"). Likewise, conditional offers do not satisfy the tender-back rule. *Grillet,* 927 F.2d at 221.

CONCLUSION

This court is of the opinion that the actions of the plaintiff in retaining the benefits of the severance package

ratified the otherwise allegedly defective release. This ratification created a new promise and a new obligation that is enforceable despite the waiver's statutory deficiencies. action.

Hurdle's complaint sets forth additional claims pursuant to 29 U.S.C. Sec. 623(d) (retaliation provision of the ADEA) and 29 U.S.C. Sec. 2000e-3 (retaliation provision of Title VII). Hurdle has not addressed these claims nor offered facts in support of same. Rather, Hurdle has averred that the claim asserted is one for age discrimination. Accordingly, final judgment is appropriate inasmuch as no other claims are asserted. An order dismissing this cause with prejudice shall follow.

SO ORDERED AND ADJUDGED, this the 11th day of April, 1996.

/s/ David Bramlette
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
F I L E D
AUG 15 1997
CLERK

CASE NO. 97-113

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PERRIN W. HURDLE

Petitioner,

versus

SEARS, ROEBUCK AND COMPANY

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF THE ARGUMENT

The issue of whether an improperly executed waiver of a claim under the Age Discrimination in Employment Act is void or voidable is not one that is worthy of this Court's review for the following reasons. First, contrary to the Petitioner's assertion, there is not a real and embarrassing split among the circuit courts of appeals, as only five of the thirteen circuits have opined on this issue.

Second, when the other courts of appeals rule on this issue, it is probable that those courts will follow the rulings of the Fourth and Fifth Circuits, resulting in the view espoused by the Third, Seventh, and Eleventh Circuits to be a marked minority view.

Finally, even though the Petitioner claims that he was denied a right protected for others in different geographical areas, a review by this Court would not allow the Petitioner any relief, as the waiver was properly executed. Thus, review by this Court is not warranted.

ARGUMENT

I. THE QUESTION OF WHETHER OR NOT A WAIVER OF A CLAIM UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT IS VOIDABLE IS NOT AN APPROPRIATE QUESTION FOR THIS COURT'S REVIEW, EVEN IF THE REQUIREMENTS OF THE OLDER WORKERS BENEFIT PROTECTION ACT WERE NOT MET.

On October 16, 1990, the Age Discrimination in Employment Act ("ADEA") was amended by the Older Workers Benefit Protection Act ("OWBPA"). *Blisten v. St. John's College*, 74 F.3d 1459, 1464 (3d Cir. 1996). The OWBPA provided, in pertinent part, that:

> (1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum --
>
> > (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
> >
> > (B) the waiver specifically refers to rights or claims arising under this Act;
> >
> > (C) the individual does not waive rights or claims that may arise after the date the waiver is

executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

Public Law 101-433, *codified as* 29 U.S.C. § 626(f)(1). At the time of this enactment, there was no dispute that a discharged employee would be allowed to waive any valid claim under the ADEA; the amendment merely qualified what acts would be considered a knowing and voluntary waiver of this type claim.

Blisten, 74 F.3d at 1465.[1]

The question presented in this Petition, however, is whether or not a waiver of an ADEA claim, which fails to meet the requirements of the OWBPA, is void as a matter of law, or merely voidable and thus, subject to ratification.

The Petitioner argues that this question is worthy of this Court's review due to a split in the Circuit Courts of Appeal that has caused him to be deprived of his due process rights under the Fourteenth Amendment to the United States Constitution. According to the Supreme Court Rules, when deciding whether or not to grant certiorari, this Court will consider, among other factors, whether there is a split in the decisions of the Courts of Appeals or whether a Court of Appeals "has decided an important question of federal law that has not been, but should be, settled by this Court . . . ." Sup. Ct. R. 10. In further explaining this Court's exercise of its power to grant certiorari, the Court has

---

[1] Prior to the enactment of OWBPA, there was a split in the Circuit Courts of Appeals regarding the question of whether or not a waiver should be decided according to a federal common law "totality of the circumstances" test or according to ordinary state contract law. *Blisten*, 74 F.3d at 1465. The OWBPA essentially codified the totality of the circumstances test. *Id.*

stated that when it is faced with a conflict among the opinions of the circuit courts of appeals, it will usually grant certiorari only in the event of a real and embarrassing conflict among the circuits. *National Labor Rel. Bd. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). In the present case, this matter is not one worthy of this Court's review for three reasons. First, there is not a real and embarrassing split in the circuits on this issue. Second, only five circuits have ruled on this issue and it is likely that with time, the view expressed by the Fourth and Fifth Circuits will become the majority view. Finally, this particular case is inappropriate for review because the release involved was properly executed.

A. This Case Presents No Real and Embarrassing Split Among the Circuit Courts of Appeals

A review of the decisions of the various courts of appeals reveals that only the Third, Fourth, Fifth, Seventh and Eleventh Circuits have considered whether or not an ADEA waiver that is not properly executed pursuant to the OWBPA is void as a matter

of law, as opposed to being merely voidable. The Fifth Circuit, for example, has consistently held that a waiver which does not meet the requirements of the OWBPA is subject to being renounced at the election of the former employee. *Wamsley v. Champlin Ref. and Chem., Inc.*, 11 F.3d 534, 539 (5th Cir. 1993), *reh'g en banc denied*, 37 F.3d 634 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1993). Thus, the waiver is an antecedent contract which is subject to being avoided. *Id.* If the employee fails to renounce the contract soon after learning of its voidablility, then the contract has been ratified because "[a] party cannot be permitted to retain the benefits received under a contract and at the same time escape the obligations imposed by the contract." *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir. 1991). Therefore, if the aggrieved employee retains the benefits and consideration paid under the waiver contract, then that party has knowingly and voluntarily waived any ADEA claims, thereby ratifying the waiver. *Wamsley*, 11 F.3d at 540. *See also, Grillet*, 927 F.2d at 220; *Wittorf v. Shell Oil Co.*, 37 F.3d 1151 (5th Cir. 1994); *Blakeney v. Lomas Inf. Sys., Inc.*, 65 F.3d 482 (5th Cir. 1995), *cert. denied,*

116 S. Ct. 1042 (1995).

The Fourth Circuit reached the same result in a case decided before the passage of the OWBPA, holding that an invalid waiver of an ADEA claim is a contract that is voidable by the employee at his election, and thus, subject to common law ratification. *O'Shea v. Comm. Credit Corp.*, 930 F.2d 358, 362 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 177 (1991). After the passage of the OWBPA, the Fourth Circuit reexamined *O'Shea* and the provisions of the OWBPA and found that Congress included nothing in the OWBPA to abrogate the common law rule that a waiver that was not executed under the guidelines of the OWBPA was voidable and thus subject to ratification. *Blisten*, 74 F.3d at 1465. Therefore, if a former employee retains the consideration paid for the release of a possible ADEA claim, the waiver has been ratified. Congress did not intend to allow former employees to retain the benefits of a waiver and legally challenge the effectiveness of the very same waiver. *Id.* at 1466.

On the other hand, the Seventh Circuit, as well as the Third and Eleventh Circuits, have held that with the enactment of the

OWBPA, Congress has stepped in and stated very specific circumstances that would be required before an employee in the process of being discharged, can preemptively waive a claim under the ADEA. *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 683 (7th Cir. 1993), *reh'g and suggestion for reh'g en banc denied, cert. denied*, 114 S. Ct. 2104 (1993). Thus, according to those circuits, if the waiver the employee signed did not comply with the literal provisions of the OWBPA, then the contract was void and was not subject to the doctrine of common law ratification regardless of whether or not the consideration was returned. *Id.* at 684; *accord*, *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 412 (1992); *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529 (3d Cir. 1997), *petition for reh'g denied*. While those circuits have established that rule, there is not a real and embarrassing split in the circuits, given the fact that only five of the thirteen circuits have decided the issue. Hence, this Court should not grant certiorari. *Pittsburgh S.S. Co.*, 340 U.S. at 502.

B. The View Expressed by the Fourth and Fifth Circuits Should Become the Clear Majority View Among the Circuit Courts of Appeals

This Court should not grant certiorari since it is probable that when the other circuits do rule on this issue, they will follow the reasoning of the Fourth and Fifth Circuits, thereby making the rulings of the Third, Seventh and Eleventh circuits the minority view. First, the view of the Fourth and Fifth Circuits is the correct view. Second, the rulings of the district courts in other circuits show that those circuits will likely lean toward the view of the Fourth and Fifth Circuits.

1. The View Expressed by the Fourth and Fifth Circuits is Correct

The view expressed by the Fourth and Fifth Circuits is that a waiver that is invalidly executed under the ADEA and OWBPA is voidable at the election of the employee. If the employee fails to repudiate this waiver, it is treated as ratified and becomes a valid and binding waiver. This claim is based on the fact that prior to the enactment of the OWBPA, there was no dispute that employees could waive a potentially valid ADEA claim against their employer. *Blisten*,

74 F.3 at 1465. Thus, even as the Seventh Circuit acknowledged in *Oberg*, in the absence of the OWBPA, there is nothing objectionable to allowing a waiver of an ADEA claim. *See, Oberg*, 11 F.3d at 687 ("Had Congress not spoken this court may have even been inclined to follow *Grillet* and *O'Shea*, and allow employees the freedom to ratify their severance agreements . . . .")

The question thus becomes one of whether or not the OWBPA abrogated the common law doctrine of ratification of an invalid waiver. It is obvious from an examination of the OWBPA that this was not the intention of Congress. In the statute itself, it is stated that "[a]n individual may not waive any right or claim under this Act unless the waiver is *knowing and voluntary* . . . ." 29 U.S.C. § 626(f)(1) (emphasis added). In the legislative history of the OWBPA, the Senate Committee further elaborated on what it considered "knowing and voluntary" in the context of these type waivers by stating that:

> Courts may not consider whether a "knowing and voluntary" waiver has been executed until the party asserting the waiver as a defense first proves that each of the requirements set forth in the bill has been satisfied. These requirements include: (1) the waiver is part of a written agreement; (2) the agreement makes specific reference to rights and claims under

> the ADEA; (3) the waiver does not apply to rights or claims that may arise after the date of the agreement itself; (4) the waiver is exchanged for valuable consideration in addition to what the individual already is entitled to receive; (5) the individual is given a reasonable time period in which to review and consider the agreement; and, (6) the individual is advised in writing to consult with an attorney.

S. Rep. No. 101-263, 101st Cong., 2d Sess. 5, *reprinted in* 1990 U.S. Code Cong. & AD. News 1509 at 1537. It is clear that the items listed in the legislative history are less stringent than those stated in the act. For instance, while the statute specifies the specific number of days for an employee to review the agreement, the Committee merely required that the employee be given a reasonable amount of time to consider the waiver. This variation in language can only be explained if it is assumed that the Committee was indicating that it had no objection to the continuation of the common law rule of ratification in this context. Therefore, when read in conjunction with the general guideline of statutory interpretation that a statute which abridges common law must be strictly construed, *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304-05 (1959), it is clear that Congress envisioned circumstances where an agreement which fails to

fully meet the requirements in the statute might still be considered valid if it is ratified under traditional common law principles.

Thus, the reasoning of the Fourth and Fifth Circuits is correct and, given time, the other circuits will agree. These rulings will make the view of the Third, Seventh and Eleventh Circuits a markedly minority view; thereby eliminating the need for this Court to rule on the issue.[2]

2. A Review of District Court Cases Show that Other Circuits are Leaning Toward the View Expressed by the Fourth and Fifth Circuits

Furthermore, a review of several district court cases show that the district courts in circuits which have not yet ruled on this issue are leaning toward the view espoused by the Fourth and Fifth Circuits. These courts, after having an opportunity to review the reasoning of both schools of thought, have determined that the view espoused by the Fourth and Fifth Circuits is the most persuasive. *Haslach v. Security Pac. Bank Or.*, 779 F. Supp. 489 (D. Or. 1991); *Hodge v. The New*

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[2] It is interesting to note that a later case decided by the Seventh Circuit has questioned the wisdom of that court's decision in *Oberg*. *See, Fleming v. United States Postal Serv. AMF O'Hare*, 27 F.3d 259 (7th Cir. 1994).

York College of Podiatric Med., 940 F. Supp. 579 (S.D.N.Y. 1996); *Bilton v. Monsanto Co.*, 947 F. Supp. 1344 (E.D. Mo. 1996), *but see, Eye v. Fluor Corp.*, 952 F. Supp. 635 (E.D. Mo. 1997) (recognizing that a split of authority exists within the district). Therefore, when the other circuits have the opportunity to rule on this issue, it is likely they will side with the Fourth and Fifth Circuits, thereby making the opposing view an extreme minority and alleviating the need for review by this Court.

C. This Case is Not Proper for Review, as the Release in Question was Properly Executed under the OWBPA

If this matter were remanded to the district court for trial, it is probable that the district court would rule that the waiver executed by the Petitioner was valid. Hence, this case is not appropriate for review by this Court. Since there is not a real split in the Circuit Courts of Appeals, the only other ground that reasonably may be asserted in support of review by this Court is the argument that the Petitioner has been denied a right allowed others in different geographical areas. However, that argument is not persuasive in this case, as the waiver executed by the Petitioner complied with the literal terms of the

OWBPA. The sections of the waiver that the Petitioner contends do not comply with the OWBPA are that he was coerced into signing the waiver and that he was not given forty-five (45) days to review the waiver. Petition for Writ of Certiorari at 1. These issues, as can be seen from the Petitioners statement of the case, are interrelated and revolve around the events that took place in his supervisor's office the day the Petitioner was told that he was no longer needed at Sears. Petition for Writ of Certiorari at 1. The Petitioner claims that he was only allowed twenty-five (25) minutes to review the waiver and that he was not informed that he would receive severance benefits if he did not sign the waiver. *Id.* Those arguments become moot in the light of Mississippi case law which holds that a person is charged with reading and understanding any document he signs. *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.*, 584 So. 2d 1254, 1257 (Miss. 1991). Further, the Petitioner does not deny that the document he signed stated, in clear and unambiguous language, that he was encouraged to seek the advice of an attorney and that he had forty-five (45) days to decide whether or not to sign the document. Therefore, the Petitioner is charged with knowledge of

those items, and the fact that he chose not to seek the advice of an attorney or to take more than twenty-five (25) minutes in determining whether or not to sign the document does not reflect on the validity of the waiver. The waiver was executed in a manner consistent with the OWBPA. Even if this Court were to remand this case to the district court for trial, the Petitioner would still be in the same circumstances. In conclusion, this Court's review of the Fifth Circuit and District Court's decision in this matter will not allow the Petitioner to recover any relief; thus, there is no reason for this Court to grant certiorari.

CONCLUSION

This matter is not proper for this Court's review. At the present time, there is not a real and embarrassing conflict among the rulings of the circuit courts of appeals because only five of the thirteen courts have ruled on this matter. Further, when the other circuits rule on this issue, they will recognize, as can be seen by the rulings of the district courts in those circuits, that the reasoning of the Fourth and Fifth Circuits is correct, and they will join together to make the view expressed by the Third, Seventh and Eleventh Circuits a marked minority view. At that time, review by this Court will be unnecessary.

Finally, in spite of the fact that the Petitioner has not been allowed to bring his age discrimination claim, a review by this Court will not allow the Petitioner relief, as the waiver involved was properly executed under the OWBPA. Therefore, there is no reason for this Court to review this question, and the Respondent requests that this Court deny the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED, this the 15th day of August, 1997.

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